MUST THE POLICYHOLDER PAY TAXES ON THE CASH SURRENDER VALUE OF HIS LIFE INSURANCE?

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This question is of interest to life insurance companies because if the taxing authorities of the States have the requisite legal authority to answer in the affirmative, it will have a deterrent effect upon the writing of new business, besides encouraging the surrender of policies and causing an increase in policy loans. The average man is not anxious to pay taxes, even when their fairness is unquestioned. Where, however, one adequate tax has been paid and notwithstanding, the tax gatherer comes round again within the same year to extract another tax from the same subject-matter the taxpayer will evince a positive interest in defeating the double burden if he can. We often hear in life insurance circles the statement that any taxation of premiums is a tax upon a tax and, speaking broadly, this is so. It is common knowledge that governmental and nonagency companies make little or no progress, as they lack the agent whose business it is to follow up and bring home to the prospect the duty he owes to his family and dependents to protect them against the financial consequences of his death. The great bulk of premiums represents very largely the extent to which policyholders are depriving themselves of present pleasures or comforts that the future needs of their beneficiaries may be answered. In this sense taxation of premiums is a tax upon a tax or the self-imposed burden which the policyholder has assumed. Hence, in view of the fact that the States at the very inception of the insurance, when a policy is written, and annually thereafter, deduct as a percentage tax from one to two and a half dollars from each one hundred dollars of the

premium paid in, the policyholder cannot be criticised if he objects very strenuously to a further penalty being placed upon his self-denial.

Theorize as the legal mind will about the percentage tax on premiums being compensation to the State for the privilege or license which the companies enjoy of doing business therein, the fact will be denied by no one that it is the policyholder who pays this tax in the increased cost of his insurance occasioned thereby.

If this system of double taxation, the tax on the premium and then again on the surrender value, is to prevail, the former being paid just as much by the policyholder as would the latter, we must expect the inevitable. It is simple to avoid paying two taxes on one's life insurance by having none; and to avoid the tax on the surrender values by borrowing on one's policies to such an extent that there would be no further value to be paid on their surrender. The first course suggests lapsation and a serious check to new insurance, while the second means encouragement in that practice which violates the cardinal principles of life insurance and leads to dissatisfaction, disappointment and lapsation in the end. So from either angle the companies are interested, or ought to be.

And, quite apart from the purely selfish interest of the matter, the companies would seem to owe their policyholders the duty of co-operating with them to defeat attempts to place this additional burden on them; they should at least make it their business to see that the policyholders have their full day in court before it is done.

STATES WHEREIN THE QUESTION HAS BEEN DECIDED IN THE NEGATIVE

The matter has been up for discussion in Pennsylvania, Indiana, Nebraska, Ohio, Minnesota and Alabama. Such information and observation as I may offer will be largely a reworking of the material developed by myself and others in the argument before the officials of the two last named States.

In each of the States mentioned efforts have been made to secure the taxation of cash surrender or other values of life insurance policies, and in each the attempt has failed. The action taken in these cases, resulting in the disposition of the question in the manner indicated, is evidenced by the opinion of Attorney-General McCormick of Pennsylvania on December 16, 1895; the case in 1898 of State Board vs. Holliday, 150 Indiana, 216; 42 L. R. A. 826; the opinions of Attorneys-General Prout of Nebraska on April 23, 1904, Hogan of Ohio on July 29, 1912, and Assistant Attorney-General Stevenson of Minnesota June 4, 1913, and the ruling of

the Tax Commission of Alabama of September 26, 1914, and its subsequent published recission of October 24, 1914. Copies of the opinions of the attorneys general cited are attached hereto.

The Text of the Statutes and Constitutions under which the Question Arose

In ALABAMA the question arose under a statute which imposes a tax upon,

"All money lent, solvent credits, or credits of value, * * *," etc.

and after covering in thirteen subdivisions other specific items, includes in the fourteenth subdivision,

"All other property, real and personal, not otherwise specified herein, including cotton, pig iron, manufactured goods, and other things of value."

The quotations are from Section 2082 of the Code of Alabama, 1907. A later law, Act 216, of 1911, Section 5, provides that,

"Every person * * * shall, when legally called on by the assessor forthwith make him a full, true and distinct statement of all the real and personal property, with a correct description thereof, of which he is the owner * * * and including all moneys hoarded and solvent credits so held or owned on the first day of October preceding * * *," etc.

The provision of the Constitution in reference to taxation is found in Section 211, Article XI, and is as follows,

"All taxes levied on property in this State shall be assessed in exact proportion to the value of such property * * *."

The Tax Commission on September 22, 1914, without notice that the matter was under consideration, issued a formal ruling to the County Tax Assessors to the following effect,—

"All insurance policies with a cash surrender or reserve value are taxable, either as solvent credits or under subdivision 14, section 2082, of the Code, unless the amount of such cash surrender value, or a part of such cash surrender value has been borrowed from the company issuing the policy. In a case of this character, the policy is taxable to the owner for the difference between the amount borrowed and the cash surrender value of the policy. If the entire amount has been borrowed, the policy is not taxable to the owner at all."

A few days after this ruling was published a hearing was granted and later the matter was argued before the full Commission, the Attorney-General being present, resulting on October 24, 1914, in

a unanimous reversal of the ruling, in which the Attorney-General concurred. The Commission gave out the following statement on that date,—

"The State Tax Commission to-day unanimously decided, with the approval of the Attorney General, that it will not insist on the payment of taxes by policyholders on life insurance policies which have a cash surrender value. In view of the decisions of the Supreme Courts of Indiana and Minnesota and the opinions of the attorney generals of New York, Ohio and Pennsylvania, construing statutes similar to ours, which decisions and opinions hold that such policies are not taxable, the Commission made the above ruling."

The Attorney-General did not write an opinion either before the ruling was issued or when it was withdrawn. The record of the matter is furnished in the first ruling issued, the minutes of the Tax Commission and its public announcement, made as above, when the ruling was withdrawn. I would note in passing that the opinion of the Attorney-General of New York, to which the Commission refers, was given in the interpretation of a statute of New York relating to another subject. The opinion was cited by counsel in explaining a rule of construction the application of which to the Alabama statute was urged upon the Commission.

In MINNESOTA the statute specified as taxable,

"Credits of every kind over and above debts owed by the creditor,"

and defined credits as being,

"Every claim and demand for money or other valuable thing, and every annuity or sum of money receivable at stated periods, due or to become due, and all claims and demands secured by deed or mortgage, due or to become due." (Sections 1974 and 1975, General Statutes 1913.)

In Section 1994 it was provided also that,

"Every person * * * shall list all his moneys, credits, * * * moneys loaned or invested, annuities * * * and other personal property."

Section 1 of Article IX of the Constitution provided that,

"Taxes shall be uniform upon the same class of subjects, * * *."

The Tax Commission asked the Attorney-General this question:

"Is the cash surrender value of a life insurance policy taxable as a credit against the person entitled to receive such surrender value?"

Before that official decided the matter, opportunity was given company counsel to present their views and the matter was discussed at

length on two occasions. On June 4, 1913, thereafter, Assistant Attorney-General William J. Stevenson, in a brief but particularly well-reasoned opinion, which is of record, answered the question of the Tax Commission in the negative.

In OHIO the broad question was raised as to whether life insurance policies were taxable—ordinary life, limited payment life and endowment policies being described as the kinds of policies the Tax Commission had in mind—the matter being referred to the Attorney-General for opinion. The General Code of 1910, Section 5328, provided that,

"All real or personal property in this State, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this State, shall be subject to taxation, except only such property as may be expressly exempted therefrom."

Section 5327 further provided that,

"The term 'credits' as so used, means the excess of the sum of all legal claims and demands, whether for money or other valuable thing * * * due or to become due to the person liable to pay taxes thereon * * * over and above the sum of legal bona fide debts owing by such person * * *"

and Section 5375 read,

"A person required to list property, upon receiving a blank for that purpose from the assessor, * * * shall make out and deliver, annually, to the assessor, a statement, verified by his oath, of all personal property, moneys, credits, investments in bonds * * * annuities, or otherwise, in his possession, or under his control, on the day preceding the second Monday of April of that year * * *," etc.

The clause of the Constitution relating to the matter, Article XII, Section 2, Amendment of 1912, was as follows,—

"Laws shall be passed, taxing by a uniform rule, all moneys, credits * * *; and also all real and personal property according to its true value in money * * *."

Attorney-General Timothy S. Hogan on July 29, 1912, in an exhaustive and careful opinion concerning the effect of the above provisions of law, held that only those policies were taxable which had matured and under which the assured was entitled to receive either one sum in cancellation of the obligation or installment payments, and then only to the extent of the payments due and unpaid.

In NEBRASKA the then law, now Section 6300, Revised Statutes of 1913, read,

"All property in this State not expressly exempt therefrom shall be subject to taxation, and shall be valued at its actual value * * *," etc.

Personal property was described (Section 6290) as including,

"Every tangible and intangible thing which is the subject of ownership and not real property * * *."

A "credit" (Section 6293) was stated to include,

"Every demand for money, labor or other valuable thing, whether due or to become due."

The requirement for listing items for assessment (Section 6313) was,

"Every person * * * shall list all his moneys, credits, * * * and all other personal property."

The Constitution, Article IX, Section 1, read as follows,—

"The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the Legislature shall direct."

In an opinion dated April 23, 1904, to the members of the State Board of Equalization and Assessment, Attorney-General F. N. Prout held that the language of the statutes did not evidence the intention of the Legislature to tax cash surrender values. In the course of this opinion some forceful comment on the situation is found.

In INDIANA the matter went to the Supreme Court. Section 3 of the tax law of 1891 provided that,

"All property within the jurisdiction of this State, not expressly exempted, shall be subject to taxation."

And in Section 50 of the act it was required that there should be scheduled for assessment different specified items and,

"All other goods, chattels and personal property, not heretofore specifically mentioned, and their value, except property specifically exempt from taxation."

The Constitutional requirement was, quoting from Article X, Section 1,

"The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, * * *."

In 1898, or the year preceding, the State Board of Tax Commissioners ordered the listing and valuation of life insurance policies. A suit to enjoin this action was brought in Marion County by John H. Holliday in behalf of himself and others similarly situated, and the judgment favored the plaintiffs. On appeal it was sustained in the Supreme Court in the case entitled State Board of Tax Commissioners vs. Holliday, reported, as before stated, in 150 Ind. 216. This, so far as I can determine, is the leading case on the subject. It is important in that, besides holding what seems to be the accepted rule, that a Constitutional provision providing for the taxation of all property is not self-executing, but requires legislative action to make it effective, it holds that, inasmuch as the Constitution required the Legislature to prescribe rules to secure a just valuation, the failure to prescribe by law any method or regulation for the assessment of life insurance policies prevented their taxation, and that the Legislature by general law could not delegate to the Tax Commission the power to provide the methods or regulations for valuing this kind of property. In this connection it was pointed out (p. 227) that, while ordinary personal property needed no special regulations to determine its value, the actual value of life insurance policies depended upon,

"so many conditions and contingencies, such as the financial condition and earnings of the company, a condition a knowledge of which is more than likely not within the reach of the taxing officer or the policyholder"

that a "fixed method or regulation prescribed by *law* [italics ours], other than that provided for ordinary and tangible property," was necessary. The Court was helped to its decision by taking into account the rule of practical construction, as the statute in question had never before in the forty years of its existence been construed by the State officials to cover life insurance policies.

In PENNSYLVANIA the Auditor-General propounded to the Attorney-General the question as to whether,

"all classes or kinds of life insurance policies are taxable, or only certain kinds, and, if so, what kinds?"

The pertinent portion of the statute, Act 229 of June 8, 1891, the language of which is retained in the present law, follows:

"From and after the passage of this act, all personal property of the classes hereinafter enumerated, owned, held or possessed by any person, * * * is hereby made taxable annually for State purposes * * *, that is to say,—

"All mortgages, all moneys owing by solvent debtors, whether by promissory note, or penal or single bill, bond or judgment; * * * or any other form of certificate or evidence of indebtedness * * *," etc.

The Constitution provided, Article IX, Section 1,

"All taxes shall be uniform, upon the same class of subjects * * *."

The Attorney-General held that under the statute quoted no life insurance policies were taxable and, while he came to this conclusion, as he stated in his opinion, for the reason that policies were not included within the words "classes hereinafter enumerated," his opinion is of interest, as he compares some prior statutes on the question and comes to the conclusion that, even if he was wrong as to the classification, the practical construction the statute and its immediate predecessors had received for many years prior thereto would compel him to decide as he did.

I have set forth the text of the above statutes in the States where this question has been decided so that they may be quickly compared with the statutes of any other State if occasion arises. From a glance through the laws of other States I believe the foregoing are quite typical, as their similarity would also indicate.

WHY A CASH SURRENDER VALUE IS NOT A SOLVENT CREDIT

One of the main grounds upon which attempts have been based to tax cash surrender values has been that they were solvent credits. This is seen in the questions asked by the tax commissions, and was adopted by the Alabama officials when their first ruling was issued. It may be worth while to outline the reasons why this is not so.

A credit or a solvent credit may be said to be that which is possessed by a person when another owes him a debt and is able to pay. Testing a life insurance policy having a cash surrender value by this, it is evident that it falls outside the definition, because while the insurance is in force the company does not owe the policyholder any cash surrender value or any liquidated debt. As long as the policy is in force the only obligation the company is under is to stand ready to pay the face of the policy when it matures. It is performing its part of the contract by keeping the policyholder

insured. Not until the company is relieved by the act of the policyholder from this important and primary obligation, not until it is "off the risk," so to speak, and its insurance function as to the policy has ceased, does it owe the policyholder anything else.

A policy of life insurance, as is well known, is a contract of indemnity in which the company, in consideration of certain regular payments by the insured, agrees to pay the face of the policy on the happening of the contingency therein named, usually either the death of the insured, or his survival of a certain definite term. The clause providing for a cash surrender value in the policy is a mere incident to this main contract. It in no way changes its significance or purpose.

The conclusion that the surrender value is not a credit seems to be unanswerable when we consider what must happen before the policyholder is entitled to it. He cannot have the cash named as the surrender value and still retain his status of being insured under the policy; he has no right to both at the same time. In the case of a real credit there is a sum owing or to be owing at a time certain without further action on the part of the citizen assessed or the parting with or giving up by him of any further consideration. To become entitled to the surrender value, however, the policyholder must part with something of very real value, even though it be of a highly intangible nature,—he must give up his insurance,—divest himself or his beneficiaries of the protection the policy affords,—cancel the obligation of the company to pay the face of the policy on the happening of the contingency in contemplation when it was written. If he thus gives up his policy he may have his surrender value, but not until then. It follows naturally enough that *when* the application for the cash surrender value is made, and the policy as a contract of insurance is ended, a credit results in favor of the person who was insured thereunder until the company pays the surrender value.

The matter was summed up in the opinion of the Attorney-General of Minnesota referred to. I quote—

"After the insured has surrendered his policy, and has demanded the cash surrender value thereof, under the terms and conditions required by the policy, he then undoubtedly becomes a creditor of the company, and the amount then due him is a credit which is taxable under the laws of this State. The relation then existing between him and the insurance company is that of creditor and debtor, and the amount due is a definite liquidated sum; but until the holder of the policy has so elected to surrender his insurance, the only relation then existing is that of insured and insurer. The insurance

policy continues in effect and is a contract of indemnity to the beneficiary. While this contract of insurance remains in force, the cash surrender value is not a *right* to which the insured is entitled without the surrender of other valuable rights, and until the insured elects to abandon his insurance contract, either by defaulting in the payment of premiums, or otherwise, he has no 'claim or demand due or to become due.'

"The cash surrender value is equivalent to salvage when the contract of insurance is abandoned. In order to obtain this salvage, the insured must part with his policy of insurance and consent to a cancellation of all of the rights of the beneficiary and surrender the status of being insured. It may well be said that it is the giving up of these rights which constitutes the consideration for the payment by the company of the cash surrender value. At any rate, these are valuable rights which must be given up before there is any surrender value in existence which could be taxed as a credit.

"While the policy continues in force, the holder has a right to elect between two inconsistent benefits of the contract, namely: first, to continue his insurance contract, preserving the rights of himself and his beneficiary,—second, to abandon all such rights, changing his status of an insured person to that of a creditor, and claim his salvage."

The same thought is expressed in somewhat the same manner in the Ohio and Nebraska Attorneys'-General opinions. It may be worthy of emphasis in this connection, and as sustaining the correctness of the position taken by these authorities, that so completely is the cash surrender clause subordinated or disconnected with the real purpose of the contract to which it is attached that it is grouped in the policy along with other optional methods of settlement which may be availed of if the policy is discontinued before it matures. These provisions were inserted to the end that the policyholder would not sustain a total loss if circumstances arose which made it impossible for him to continue the policy in force,—that is, pay the further premiums contemplated by it.

All of these provisions are in the nature of "salvage," using the term employed by Minnesota's Attorney-General. To bring any one of them into operation involves the giving up of the main or original contract. As is well known, these options on surrender provide that the policyholder may, (a) receive a sum in cash and cancel all insurance, (b) take paid-up insurance for a sum smaller in amount than the face of the policy—the original amount insured, or, (c) have this original amount insured continued for a certain term only (called extended insurance) on the expiration of which the protection no longer exists. With the two last companion provisions existing, it does not follow at all that on the abandonment

of the policy of insurance the option as to the surrender of it for the cash value will be chosen, and if either of the other two is decided upon the company will never owe the surrender value, hence, it may never be a credit of the policyholder's.

For these reasons it would seem that all attempts to tax cash surrender values as credits must fail, for to assert that they are such in the face of the facts is to deal in wholly untenable assumptions. As was said by Attorney-General Prout, of Nebraska, in his opinion cited,

"It is perfectly clear that the Board [of Equalization and Assessment] must assume an insurance policy is annulled before it can assess as property the cash surrender value thereof. Public policy favors the enforcement of contracts, and the Board cannot assume they are cancelled for the purpose of discovering property which has no existence in fact as long as the contracts are in force."

Are Life Insurance Policies Taxable as Personal Property?

If the views expressed and the points in the authorities cited are well taken,—and, we submit, the facts of the matter can support no other conclusion,—it follows that if life insurance policies are to be taxed it must be done on the theory that, apart from the erroneous contention that they represent a "credit," and, therefore, are personal property, they are covered otherwise in the general or omnibus clauses of statutes which impose a tax on "all property," "all other property," "other things of value," or, as in the Indiana statute, on "all other goods, chattels and personal property, not heretofore specifically mentioned . . .," etc. In contentions that policies are taxable under these omnibus clauses the cash surrender value feature is urged not as creating a "credit," but as merely furnishing an easy measurement of the value of the policies as personal property.

In touching on the applicability of these general statutes, we will admit that the academic definition of "personal property" is broad enough to include not only policies of legal reserve companies having this surrender or salvage provision, but those not having this incidental feature, and if this admission should in any quarter be taken as material let it be said that by the same token policies in fraternal, assessment, and beneficiary societies, policies of casualty and fire insurance companies and of purely local institutions, such as farmers' hail, fire and livestock insurance companies, as well as the mutual agreements of members of underwriting associations, are also covered and to the same extent. If it be concluded, therefore, that a general statute which imposes a tax on all personal

property includes life insurance policies having a surrender value clause, the same reasoning will bring within such statute all forms of life insurance policies as well as other insurance contracts, as all must be conceded to be a species of personal property.

Tax authorities, however, are, and must be, concerned primarily not with the refinements of definitions, but with the intent of the Legislature.

The necessary limits of this discussion will prevent the taking up of the statutes of each of the States. There are, however, certain observations which will apply generally.

DOUBLE TAXATION NEVER PRESUMED

In the first place, in searching for the intent of the Legislature in the revenue-raising statutes of any State, we must bear in mind —without unnecessarily enlarging upon it—the principle that the presumption is always against the intention of the Legislature to impose double taxation on the same subject, and that before the courts will give effect to such alleged intent the same must appear with such clearness as to make any other interpretation untenable. The rule is stated in the case of *County Commissioners of Rice Co. vs. Citizens' Bank,* 23 Minn. 280, as follows:

"The general policy of the law is to avoid duplicate taxation. No one subject of taxation ought to be required to contribute more than once to the same public burden, while other subjects of taxation, belonging to the same class, are required to contribute but once. In the exposition of any tax law, therefore, a construction leading to any such result should be avoided, unless the cogency of some express provision or unavoidable implication of the statute compels its adoption."

See also:

Montgomery County vs. Gas Light Co., 64 Ala. 269.
Tax cases, 12 Gill & Johnson, 117.
First National Bank vs. Douglas Co., 124 Wis. 15.
State vs. St. Paul Union Depot, 42 Minn. 142.

Bringing this presumption to bear on the laws of practically all the states, we observe that the percentage tax is deducted from the premium when paid to the company. No matter under what guise the tax is collected, the money the policyholder pays the company to furnish him the insurance is minus the specific part of it the company pays to the State. If the policyholder's right to insurance, or the contract, the evidence of the right, is taxed as personal property, it must be on some theory in the last analysis

that he has or will have some interest, immediate or remote, in the assets of the company. Whatever assets a company owns result from the premiums collected. If the company pays the taxes on those premiums or those assets, when the policyholder is required to pay also, a double taxation results in fact. The cases cited suggest that it results in law also. The point is mentioned merely to emphasize that if the Legislature meant to tax life insurance policies, in view of the heavy taxation already placed on premium collections, it must make that intention clear to the point of being specific.

RULE OF *ejusdem generis*

When a statute explicitly covers a definite object or a specific thing, of course there will exist no doubt concerning its intent. When, however, the statute is silent as to the species of property sought to be taxed and specific items are alleged to be covered by general language, resort must be had to recognized rules of construction, if the intent of a legislature is to be determined by methods which have had for over a century the approval of the courts here and in England. One of these rules which early came into existence is that of *ejusdem generis,* which holds that where an enumeration of things, classes or persons is followed by general words, these general words will be construed as applying to merely other items of the same general kind or character as the particular kinds specially set forth—or, as one authority says, "other" or "any other" following an enumeration is to be read as though it said "other such like."

It is a common method for statutes imposing taxes to enumerate in detail specific items of personal property which are to be taxed (making no reference, however, to life insurance policies or cash surrender values) and then, as in the Alabama statute, cover everything apparently with a general clause, such as, "all other property, real and personal, not otherwise specified," etc. On the face of it, even to a lay mind, the question naturally arises, Why, if it was the intention of the Legislature to include every conceivable shade, kind and type of property, tangible and intangible, rights and possibilities to which the suggestion of property or value might attach, did it not write one simple, all-embracing section in appropriate language and rest its case? Why all the apparently useless legislative work of subdivision, classification and selection, and with such great particularity, if a general clause was to be added or prefixed, of sufficient strength to include every possible item which might

have been out of the author's mind when the list was being written?

The courts have answered this question by the rule suggested. They have said the general clause is not of sufficient strength to cover every kind of property not enumerated, and its only effect is to include other items or things of the same general nature as the classes or things enumerated. In other words, that the various subjects of property separately set forth are illustrative of the type or kind of property intended to be covered by the general words and that the words cover these and no others. The several attempts to place insurance policies in the same class with credits bear evidence that there is no other class of the kinds usually enumerated into which they fall naturally, and the authorities sufficiently dispose of the claim that they are either credits or like unto credits to prevent their classification with them. Hence, it follows that if general words of the kind suggested are to be invoked, when found in a tax statute, as applying to insurance policies, there must be in the specific items enumerated some kinds or classes of property named which, without straining or dealing in nice refinements of definition, easily include them. Construing a statute of the kind under discussion by this rule of *ejusdem generis,* due relative weight is given to all parts of it and no obscurity results, as would be the case if we were to admit that the added general words had the same weight as if they stood alone.

The New York Court of Appeals, in the *Matter of Hermance,* 71 N. Y. 481, has this to say on the point at page 487,—

"It is said to be a good rule of construction that 'when an act of parliament begins with words which describe things or persons of an inferior degree, and concludes with general words, the general words shall not be extended to any thing or person of a higher degree;' that is, 'when a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class.' (*Archb. of Canterbury's Case,* 2 Coke 46a; *Lyndon v. Stanbridge,* 2 K. & N. 51; *Reg. v. Edmundson,* 2 E. & E. 83; *Gibbs v. Lamen,* 30 L. J. Ch. 170; *Broom's Legal Max.* 625.)"

In that case the Court was called upon to determine the meaning of a statute which was designed to permit the County Court and Board of Supervisors to correct errors in the returns concerning assessments made by town officers. The statute, in terms, authorized the Court and the Board of Supervisors "to correct any manifest, clerical, or *other* error in any assessments or returns made by any town officer to such boards," etc. But the Court, applying

the rule as quoted above from the opinion, held the general and seemingly all-embracing words *"or other"* to be without power to enlarge the class of errors which could be corrected beyond those that were, "manifest" and "clerical," saying,

"The words, 'or other,' following 'clerical,' do *not* enlarge the class of errors of which the County Court and the Board of Supervisors have jurisdiction under the statute, *so as to include errors of substance."* [Italics ours.]

Again, the Court of Appeals, applying this rule in the case of *People vs. N. Y. & Manhattan Beach Ry. Co.,* 84 N. Y. 565, held that an action to recover real property was not within the purview of a law which authorized the bringing of actions by the people of the State to recover "money, funds, credits, and *property"* held by public corporations, boards, officers, or agents for public purposes, which have been wrongfully converted or disposed of, the holding of the Court being that,

"the word property, associated as it is with the preceding words of specific description, is to be construed as referring to property of the same general kind with that previously enumerated."

Other cases in point are:

State vs. Jackson, 168 Ind. 384.
Amer. M. Co. vs. Virginia M. Co., 91 Va. 272.
Ex Parte Williams, 87 Cal. 78.
Lynchburg vs. N. & W. R. R. Co., 80 Va. 237.

Constitutional Considerations

In pursuing this inquiry it may be well to note that it does not follow that merely because a constitution places on a legislature the duty of enacting laws imposing a tax on all property, real and personal, that every species of personal property, no matter how intangible or difficult of intelligent subdivision and treatment, is thereby put under the burden. If such a constitutional requirement exists it is what Cooley in his Constitutional Limitations, 6th Edition, page 98, calls, "only a moral force," and concerning it he says,

"The legislature ought to obey it; but the right intended to be given is only assured when the legislation is voluntarily enacted. Illustrations may be found in constitutional provisions requiring the legislature to provide by law uniform and just rules for the assessment and collection of taxes; these must lie dormant until the legislation is had; they do not displace the law previously in force, though the purpose may be manifest to do away with it by the legislation required."

So, even if we have an extremely broad and apparently all-embracing provision of a constitution before us, we may still look to the statutes to determine the uttermost extent of the burden actually imposed,—in other words, that the constitution is not self-executing. This was decided in the Indiana case cited, where the Constitution directed the Legislature to secure the "taxation of all property, both real and personal," and was conceded to be the case by the Ohio Attorney-General, in the opinion referred to, under a similar constitutional provision.

The provisions of the various state constitutions seem to be fairly evenly divided, some following the comprehensive, and in tone mandatory, language of that of Indiana, and others adopting the idea expressed in the constitution of Missouri (Art. X, § 4), which merely provides that,

"All property subject to taxation shall be taxed in proportion to its value."

When the Legislature acts, however, it must do so in compliance with the constitutional requirement, if it would act effectively. It is elementary that the right to tax is inherent in the Legislature as an attribute of its sovereignty, that such right is not conferred by the Constitution, but rather that it is limited and restricted by it. Hence, whatever limitations, restrictions or directions the Constitution contains in reference to taxation and other subjects must be observed by the Legislature when it exercises its powers.

One of the important constitutional requirements which is found in substantially all the constitutions is that the property subjected to the tax must be taxed, "in proportion to its value" or on a "just valuation" thereof. These provisions of limitation have a very important bearing on the question in hand. Aside from the necessity legislatures are otherwise under to clearly indicate their intent to include life insurance policies in the list of taxable property to secure their taxation, if such in fact is to be accomplished, these provisions make it necessary that they should go further and provide adequate methods or regulations which will secure that just or proportionate valuation so required. If no such method is provided the attempted tax fails.

Having in mind the wording of the Indiana constitution and statutes, I can do no better than let the opinion of the Court in *State Board vs. Holliday* state the point. After considering the statute and quoting the constitutional provision, it said, at page 220,—

"This constitutional provision does not confer the power of taxation, because that power being sovereign, it is inherent in the legislature. But the provision is rather a limitation upon the power to tax. It is, therefore, a legislative power to select the subjects for taxation, and this constitutional provision imposes the duty and limitation upon the legislature of providing by law *regulations* or *methods* for a just valuation of all property, both real and personal, for taxation. Where the legislature has not exercised this power, no other department of the State government can supply the omission; and where no such regulation has been prescribed by law as to any particular species of property, then such property cannot be taxed. This conclusion may rest either on the inference from such failure to prescribe such regulations that the legislature did not intend to select that particular species of property as a subject for taxation, or regardless of the legislative intent the failure to prescribe such regulations leaves such property unselected as a subject for taxation. *Riley v. Western Union Tel. Co.,* 47 Ind. 511; *Senour v. Ruth,* 140 Ind. 318; *Hyland, Auditor, v. Brazil Block Coal Co.,* 128 Ind. 335. The statute must not only provide what property shall be taxed, but it must provide methods for the valuation of such property, and clothe some person, officer, or tribunal with power and authority to assess such valuation; and, if the statute contains no such provisions, it will be insufficient to subject such property to taxation. *Riley v. Western Union Tel. Co., supra; Senour v. Ruth, supra.*"

And, after a lengthy discussion of other points, the opinion continued, at page 234,—

"But there is still a stronger reason for the conclusion that the legislature did not intend to include life insurance policies by the tax law of 1891 as subjects for taxation, and that is the fact that the act provides no regulation for their valuation. In that and subsequent statutes the legislature has provided special regulations for the valuation of all those classes of property that are difficult to value, different from that provided for ordinary property, and many of them not as difficult as life insurance policies. For instance, the property of banks and bankers, foreign corporations, such as insurance companies, telegraph companies, telephone companies, express companies, sleeping-car companies, railroads, and the like. Special regulations are provided by statute for valuing for taxation the several classes of property above mentioned. And the question arises why did the legislature provide no regulations for the valuation of life insurance policies if it intended to include them by the language we have quoted from the tax law of 1891? * * *."

and further, at page 235,

"We therefore conclude that the legislature did not intend to make life insurance policies subjects of taxation, and, failing to provide any regulations for, or manner of assessing or valuing such policies

for taxation, if they do fall within the literal words of the tax law of 1891, we hold that the act of the State Board of Tax Commissioners, in providing regulations for, and ordering them to be assessed for taxation was without authority of law, and void."

In *Auditor vs. U. S. F. & G. Co.,* 133 Ky. 299, at page 304, the Court says:

"There is no rule of law better settled than that the power to fix the rate of taxation is in the General Assembly, and it must fix a well defined rule to serve as a guide to the ministerial officers throughout the State who have to carry it into effect. It is equally well settled that this power can not be delegated to a board or any subordinate body, or even to a court, but it alone can exercise it."

See also *Gaines vs. Hudson County,* 37 N. J. L. 12.

Connected with this constitutional requirement that property should be taxed, if at all, in "proportion to its value" or on a "just valuation" is the other requirement that taxation must be *"uniform and equal,"* this provision being in substantially all constitutions. These two fundamental rules must be complied with in any taxation of life insurance policies. The mere incident that one policy contains a cash surrender value privilege while another lacks it, does not prove anything as to the value, for constitutional taxation purposes, of the first policy. Both may be equally valuable if they are permitted to mature according to their terms. If the taxpayer is on his deathbed, his policy with no reserve or surrender value, in a weak but still going company, may be worth many times that of a healthy citizen insured in a stronger company for the same amount, which has a reserve or surrender value. The actual value of a life insurance policy as personal property,—the one element with which the assessor is concerned,—to any citizen varies between the extremes of health and infirmity. The cash surrender value is but one element in determining the actual value of a policy in force, and the other elements which fix the policy's value cannot be ignored without assuming arbitrarily that the policy is to be at once surrendered. Arbitrary methods in arriving at actual values for taxation will not be tolerated by the courts. They will so regard any method which considers but one element, ignoring other existing ones. See *Board vs. Alabama Central,* 59 Ala. 551. Chief Justice Brickell, of Alabama, had this to say of a legislative direction that *income* alone should be considered in determining the value of the property taxed (page 555),—

"The Constitution is plain, and imperative. The value of property, not its income, is the standard on which an assessment must be based.

The legislature may prescribe rules, and may supply instrumentalities for ascertaining such value. * * * It is not competent for the Legislature to declare that any species of property is of a particular value, because of its income, or to declare that the income alone shall be considered in determining its value. * * * We cannot read the Constitution, without a conviction that its purpose is to free property from all arbitrary and artificial taxation."

Then, too, if contracts having a cash surrender clause insuring against the contingency of death are to be included in the general words of statutes of the kind suggested, to prevent such law from being unconstitutional for lack of uniformity and equality, all other contracts of indemnity against death, sickness, accident, fire, liability and all other casualties and contingencies must be assessed also, as each is the same kind of personal property as the other, all being merely rights or contracts relating to indemnity.

See also *State Board vs. Johnson,* 173 Ind. 76.

Intangible Property which is not Taxed

The mere suggestion of these other forms of insurance, all equally personal property within the strict technical definition of the term, brings to mind the thought that, of course, there are many things within the description of personal property that by common consent and partly because of their extreme intangibility, or the difficulty of intelligently admeasuring their actual value, go untaxed. For instance, contracts for the payment of money on completion of professional or personal services; the innumerable executory contracts, some of great commercial value, such as agency relations, and all unliquidated and contingent demands. (See 37 *Cyc.* 783, *et seq.*)

The courts have held in one jurisdiction that a license to sell liquor was not taxable under a general clause, *Harding vs. Board,* 133 N. W. 191; that a mutual insurance company is not taxable on the notes of its members given in anticipation of loss, and assessments, *K. & L. Mutual Ins. Co. vs. Commonwealth,* 153 Ky. 824; that a statutory liability for the taking of land is not a taxable asset, *Powers vs. Worcester,* 210 Mass. 471; that commissions due temporary administrators which are unliquidated and unpaid are not subject to taxation, *People vs. Cameron,* 140 A. D. (N. Y.) 76; that the good will of a business is not taxable, *Hart vs. Smith,* 159 Ind. 182; nor a seat on the stock exchange, *Mayor vs. Johnston,* 54 Atl. 646, *People vs. Feitner,* 167 N. Y. 1; nor a certificate of membership or stock in the Associated Press, *Arapahoe County vs. Rocky Mountain News Printing Co.,* 15 Colo. Ct. of Appeals 189, 200; nor a

trade-mark of a distillery company, *Commonwealth vs. Ky. Dist. & Warehouse Co.,* 132 Ky. 521. And so the list of forms of untaxable intangible personal property could be increased, all showing that technical definitions do not as a practical matter control the applicability of tax statutes.

In the case of *Kenton Ins. Co. vs. Covington,* 86 Ky. 213, the Court said in discussing the company's obligations to pay taxes on its unearned premium reserves (page 218),

"The policyholder is not required to pay taxes on the amount of his policy, because he is entitled to no part of the money until he has sustained a loss."

and, again (page 222),

"It is plain that the policyholders have parted with these premiums, and that the company is in the possession of the money under their contracts of insurance. The money or its equivalent is certainly not taxable as against the policyholder. * * * The company is the absolute owner."

The Force of the Rule of Contemporaneous Construction

One reason there is such a dearth of authorities on the question we are discussing is that in the history of life insurance there have been so few attempts to tax, on any theory, the policies in the hands of the policyholders. The great majority of the States have been satisfied, as indeed they ought, with the toll they now exact from the premiums paid. This suggests what to my mind is one of the strongest legal reasons which can be urged in opposition before the proper officials, if the effort is made again to make the old wording of statutes apply to and include life insurance policies. I refer to the well-recognized and much-sustained rule of contemporaneous construction.

As applied to the situation in Alabama, its force was so persuasive that, if the matter had been tested in court, I believe it would have proved conclusive. There the revenue law had been revised and re-enacted several times since 1865. Clauses similar to the "solvent credit" provision, and to the general or omnibus section, had been in the statutes since that time. Amendments had been made from time to time extending its provisions to additional species and kinds of property. Since it had been in existence the law fixing a tax on premiums had been enacted. As late as 1911 a law had been passed entitled, "To further provide for the Revenues of the State of Alabama," Section 5 of which provided for a "full statement of subjects of taxation required of taxpayers," and Sec-

tion 4 of which made further changes in the rate of the premium tax.

At no previous time in its history, however, had any attempt been made by the officials charged with its administration to construe it as including or covering life insurance policies or cash surrender values. These circumstances disclosed a situation which brought it squarely within the rule announced in the *State Board vs. Holliday* case on this point, and in a long line of cases from different jurisdictions in construing other statutes.

What was true of Alabama and Indiana may be true of other jurisdictions if the question arises elsewhere. The discussion in the opinion in the Holliday case covers the situation so completely and is so replete with standard authorities that I quote again from it (page 229):

"If the present tax law includes in the words we have quoted life insurance policies as subjects for taxation, then every tax law that ever was enacted under the present constitution has likewise included them, and yet never before was it supposed that they were so included. Such laws have uniformly been construed and acted upon as if they were not intended to select such policies as subjects for taxation, nor has any attempt ever before been made by any of the officers charged with the duty of executing such laws in this State to assess and value for taxation such policies. This is practically conceded by the learned counsel for the appellees. Black, on the Interpretation of Laws, p. 221, says: 'The executive and administrative officers of the government are bound to give effect to the laws which regulate their duties, and define the sphere for their activities, and, in so doing, they must necessarily put their own construction upon such acts. When the courts shall have interpreted the laws, these officers are of course bound to accept and abide by their decisions. But in advance of such judicial construction, they must interpret the statutes for themselves, and to the best of their own abilities. * * * But it is a rule, announced by the Supreme Court of the United States, at an early day, and which has since been followed in numerous cases both in the Federal and State courts, that the contemporaneous construction of a statute by the officers who have been called upon to carry it into effect, made the basis of their constant and uniform practice for a long period of time, and generally acquiesced in, and not questioned by any suit brought, or any public or private action instituted, to test and settle the construction in the courts, is entitled to great respect, and if the statute is doubtful or ambiguous such practical construction ought to be accepted as in accordance with the true meaning of the law, unless there are very cogent and persuasive reasons for departing from it.' To the same effect is Cooley on Const. Limitations (6th ed.), 51-58."

And again at page 233,

"Sutherland on Stat. Const., section 311, says: 'The contemporary and subsequent action of the legislature in reference to the subject-matter has been accepted as controlling evidence of the intention of a particular act.' Here for a period of over forty years numerous tax laws in effect as broad and comprehensive in the language employed as to the property embraced as the tax law of 1891, had been constantly acted upon and construed by both officers and property owners as not including life insurance policies as subjects for taxation. And the taxing officers and taxpayers of the several States of the Union had construed similar taxing laws in a similar way. Up to that time no attempt had been made, so far as we are advised, by any civilized government, either by legislation, executive, or administrative action to select and treat life insurance policies as property which ought to be taxed and subject them to taxation. These are the circumstances under which the legislature acted in passing the tax law of 1891. The presumption is that these historical facts were known to the legislature. *Mode v. Beasley,* 143 Ind. 306. Sutherland on Stat. Const., section 333, says: 'It is presumed that the legislature is acquainted with the law: that it has knowledge of the state of it upon subjects upon which it legislates; that it is informed of previous legislation and the construction it has received.' Therefore, the legislature, with knowledge that all the previous tax laws, practically the same as the tax law it passed in 1891, had been construed by all the officers charged with their execution, as well as by the people affected by them, as not including life insurance policies, it would be most unreasonable to suppose that the legislature, by the use of the words we have quoted from that act, intended to include such policies as subjects for taxation. In the light of all these facts, the intent not so to include them seems apparent, because, as is said by Sutherland on Stat. Const., section 333, 'if it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effectuate that intention.'"

That this principle, among other considerations, also moved the Attorney General of Pennsylvania to decide in 1895 that life insurance policies could not be taxed under the revenue statute of that State, is apparent by his discussion of the point in his opinion.

See also:

O'Connor vs. Gertgens, 85 Minn. 481.
State vs. Board of Assessors, 26 Southern 872.
State vs. DeParis, 26 Southern 91.
Bloxham vs. Consumers' Elec. Light Co., 29 L. R. A. 507.

and the numerous citations referred to therein.

Even if there were no other grounds for contending that the tax statutes did not cover life insurance policies, these authorities would seem well able to sustain the point taken. When, however, they are

considered in the light of the other serious considerations, which on other grounds seem to prevent the tax statutes from applying to life insurance policies, it is difficult to see why they do not become absolutely controlling.

Practical Difficulties of Administering a Law Taxing Life Insurance Policies

No discussion of the subject would be complete without calling attention to the difficulties which would arise if a law were enacted which required the taxation of life insurance policies, or if existing statutes were construed to cover them. The variation in the legal situation presented by the separate rights of the different parties in interest to a policy of life insurance suggests the confusion which would result.

For example, it would have to be determined to whom the policy would be assessed,—to the insured, or to the beneficiary? To the one who is paying the premiums, or to another person who is not? This would involve the question of whether the rights of the beneficiary were vested. If they were, as in the case in which the wife is named as beneficiary and the insured has no power of revocation, because of the legal difficulties of assessing it to the insured, it might be concluded the policy should be assessed to her. But what taxable interest has the beneficiary in a policy, if, in order to make it valuable to her as a practical matter, the insured must keep up his premium payments? It must not be forgotten, either, in this connection, that if the policy has any value before it matures which can be exposed for sale or reduced to the concrete, she cannot have it without the husband, the insured, joining her in giving title to it, as it were. She cannot use it as collateral, or borrow money on it unless he joins her in the request, which necessity for joint action applies equally if the husband takes the initiative to secure the surrender value of the policy. These remarks apply to any other beneficiaries where the power of revocation is not reserved.

If more than one beneficiary is named, which is often the case, what will happen? Will the value of the policy after it has been found be assessed equally between the beneficiaries? If such policy runs to two or more, or to the survivors of them, and one is very old and the others are very young, will the probabilities of survivorship be taken into account in apportioning the value between them? It ought to be, if they must pay a tax on the value each possesses in such a contingency or possibility. Suppose the beneficiaries are in-

fant children, must the tax gatherer seek out the babies to be sure they do not escape the tax on the protection the policies give them? How are survivorship policies to be treated which are issued on the lives of two people,—which one will receive the money on maturity, —will the law determine this?

And what of the policies where the right to change the beneficiary is reserved but in which, nevertheless, beneficiaries are named? Is the assessor to be given the right to assume that the insured will change them and to say just how they are to be changed? This will be the effect if in every instance it be held that such a class of policies is to be treated as payable to the estates of the insured. Or will the law make fish of one and fowl of another by saying that a policy payable to the estate of the insured is taxable, while another policy of like amount, like plan, same premiums, in as responsible a company, but with another beneficiary named, shall go free? Will it tax the modern policies merely because in the development of the business the surrender value clause has been inserted, while the older policies, representing more value in comparison, but lacking this clause, will not be so burdened? Or will it in effect say that one citizen who puts all he can afford for insurance into the cheaper forms of policies, in order to secure a maximum of immediate protection, is to be relieved, while his neighbor paying as much in premiums for a less amount of insurance is to be taxed, merely because his prudence leads him to take only policies in companies which, because of law and good practice, carry a reserve against each policy issued?

These are but a few of the questions which will arise, and which must be answered in a constitutional way before the taxation of life insurance policies or cash surrender values can be put into successful operation. The intricacies and difficulties which of necessity will beset the assessment and collection of such a tax are the best evidence that the legislatures did not intend to impose it.

Conclusion

Summing the matter up, then, I submit in answer to the question asked in the title that neither cash surrender values, nor life insurance policies otherwise, are taxable for the following reasons:

(a) That they are not and do not represent debts or claims which are due the policyholder without the giving up by him of a valuable consideration.

(b) That they are not mentioned specifically in the tax statutes wherein are enumerated the items or subjects of property upon which the tax is imposed.

(c) That they are not included in the general words of the statutes, as they do not fall within any of the classes of property specifically enumerated.

(d) That no adequate rules, regulations or methods have been adopted by the legislatures to secure their uniform, equal and proportionate valuation as required by the constitutions.

(e) That by the long-continued and uniform interpretation of these general laws covering periods of many years, state officials charged with their administration have construed them as not applying to life insurance contracts, a construction in which the legislatures have concurred by reason of their failure to amend by specifically inserting life insurance policies, among other subjects, in the statutes.

(f) That the legislatures have otherwise given evidence that it was their intention to tax life insurance by the more certain, direct and easy method of levying and collecting premium taxes, thus avoiding the problems and confusion which would attend the collection of the tax from the individual policyholder.

PENNSYLVANIA

Attorney-General's Department. Opinion to the Auditor-General in reply to query propounded: Whether all classes or kinds of life insurance policies are taxable, or only certain kinds, and, if so, what kinds?

McCormick, Att'y-Gen., Dec. 16, 1895.—I am in receipt of your communication of the 25th ult. in which you enclose copy of a letter from the commissioners of Allegheny County, in reference to the taxation of certain policies of life insurance companies held by residents of this state, and also containing a request from you for instructions from this Department upon the matters referred to. The question you propounded is, "whether all classes or kinds of life insurance policies are taxable or only certain kinds, and, if so, what kinds?"

The question here raised is one of great importance, and has received careful consideration at my hands. The second section of the Act of June 1, 1889, P. L. 420, makes it the duty of the Board of Revision of Taxes, in cities co-extensive with counties, to "furnish the assessors of said city annually, and the commissioners of the other counties shall annually furnish the assessors of the several townships, boroughs and cities of the respective counties, with blanks in the form prepared and supplied by the Auditor-General," the assessors to furnish a copy of the same to every taxable person, co-partnership, unincorporated association, etc., in his respective ward, district, borough or township, etc., upon which blank each taxable person, co-partnership, unincorporated association, company, limited partnership, etc., shall respectively make return annually of the aggregate amount of all the different classes of personal property made taxable by the first section of the Act of June 1, 1889, which, as amended by the Act of June 8, 1891, P. L. 229, so far as it affects the question here raised, may be quoted as follows:

"That from and after the passage of this act, all personal property of the *classes hereinafter enumerated,* owned, held or possessed by any person, persons, co-partnership or unincorporated associa-

tion or company, resident, located or liable to taxation within this Commonwealth, etc., is hereby made taxable annually for state purposes at the rate of three mills on each dollar of the value thereof, that is to say:

"All mortgages, all moneys owing by solvent debtors, whether by promissory note or penal or single bill, bond or judgment; all articles of agreement and accounts bearing interest; all public loans whatsoever, except those issued by this Commonwealth or the United States; all loans issued by or shares of stock in any bank, corporation, association, company or limited partnership, created or formed under the laws of this Commonwealth or of the United States, or of any other state or government, including car trust securities and loans secured by bonds or any other form of certificate or evidence of indebtedness, whether the interest be included in the principal of the obligation or payable by the terms thereof, except shares of stock in any corporation or limited partnership liable to the capital stock tax imposed by the 21st section of this act, or relieved from the payment of tax on capital stock by said section; all moneys loaned or invested in other states, territories, the District of Columbia or foreign countries; all other moneyed capital in the hands of individual citizens of the state: PROVIDED, that this section shall not apply to bank notes, or notes discounted or negotiated by any bank or banking institution, savings institution or trust company: AND PROVIDED, that the provisions of this act shall not apply to building and loan associations."

The act of June 8, 1891, above referred to, so far as subjects of taxation are concerned, is an exact transcript of the Act of June 1, 1889, the rate being changed from three mills to four mills on the dollar under the Act of 1891.

In the preparation of the blanks required by the Act of 1889 to be furnished to the assessors, your Department, in the 9th paragraph of such blanks, instructs the tax-payer to make return as follows:

"9. *Moneys*—owing by solvent debtors of this or any other state or county, represented by promissory note, penal or single bill, bond (except bonds of Pennsylvania corporations paying a tax upon capital stock) or judgment, including loans on collateral and policies of life insurance issued by foreign or domestic stock or old line mutual companies."

And, again, in the printed instructions to tax-payers (Paragraph 11), you use the following language:

"The provision of the act taxing all moneyed capital, does not apply to bank notes, or notes discounted or negotiated by any bank,

banking institution or trust company. It will be noted that all policies of life insurance, whether full paid or not, issued by foreign or domestic stock or old line mutual companies (known as level premium companies), must be returned by the holder at their value at the time of the assessment period."

If life insurance policies are subject to taxation, the authority therefor must be found in the Act of the Assembly. All the subjects of taxation are enumerated and are as above quoted. The blank form of return would appear to indicate that your Department construes them to be covered by the phrase "moneys owing by solvent debtors;" but it should be noted that the "moneys owing by solvent debtors," to be taxable, are such as, by the terms of the act, are evidenced "by promissory note or penal or single bill, bond or judgment." It cannot be said, I think, that a life insurance policy of any kind can be within the purview of the language quoted, nor can it be said to be within the phrase "loans secured by bonds or any other form of certificate or evidence of indebtedness, whether the interest be included in the principal of the obligation or payable by the terms thereof." This, I think, has reference to what are understood to be loans in the ordinary acceptation of the word. Nor can it be said that life insurance policies fall within the phrase "all other moneyed capital in the hands of individual citizens of the state." Life insurance policies, by common understanding, are not "moneyed capital." They are rather contracts of indemnity, sometimes written upon what is termed "the ordinary life plan," at other times to be paid up by a certain number of installments, and the amount payable at the death of the assured; in other cases payable at a certain date, known as "the endowment plan." Sometimes the amount of the policy is payable to the legal representatives of the assured after his death, but more frequently to other beneficiaries.

It may be true and admitted that policies of life insurance, in most instances, have a cash surrender value by the terms of the contract, varying with the amounts paid thereon, and that it is within the legislative power to tax them; but the practical question is, has the Legislature included them within the subjects of taxation? As has already been stated, the Act of 1891 follows the Act of 1889 precisely in its subjects of taxation; and it may be said, for the purpose of reaching the legislative intent, that, by the 17th section of the Act of June 7, 1879, "*money owing by solvent debtors,* * * * money loaned or invested on interest in any other state, *and all other moneyed capital* in the hands of individual citizens of the state," was made taxable for state purposes. It would appear, therefore, that,

from 1879 down to 1891—a period of twelve years—practically the same language was used in naming the subjects of taxation, so far as they are relevant to the question here raised; but not until the present year, as I am informed, has your Department, in the preparation of its blanks to be used by the assessors, included life insurance policies within its list of taxable subjects.

The contemporaneous construction given the acts of 1879, 1889 and 1891 excluded life insurance policies. If such construction by your department of the acts above referred to had not been in accord with the legislative intent, it is fair to assume that the Legislature would have long since corrected the law by adding life insurance policies as a taxable subject. They have not done so, and I am of the opinion that policies of life insurance of no kind are the subject of taxation for state purposes under existing law.

In your communication to me you say that, "After examining the subject and ascertaining that certain policies of life insurance *had a present cash value,* I deemed it my duty to include them within the class of personal property subject to taxation." I cannot agree that the fact that these policies have a surrender cash value makes them taxable. Fire insurance policies also have a cash surrender value, and if that is a sufficient reason, they, too, would be taxable. The broad ground upon which I put my conclusion is, that life insurance policies were not intended to be included within any of the acts of assembly providing for taxation for state purposes.

The Act of 1891 does not provide that "all personal property" is to be taxed, the language of the act being "all personal property *of the classes hereinafter enumerated,*" thus clearly excluding all such personal property as does not fall within any of the classes enumerated. Believing as I do that life insurance policies cannot, by any rule of interpretation, be included in any of the classes of property named in the act, it follows that they cannot be taxed, and therefore should not be returned by the tax-payer.

NEBRASKA

April 23, 1904.

Hon. John H. Mickey, Governor,
And Others, Members of the State Board
of Equalization and Assessment,
Lincoln, Nebraska.

Gentlemen:

Through your secretary, I have received a communication requesting an opinion in answer to the following question:

"Is the cash surrender value of a life insurance policy assessable?"

It seems to me this question is easy of solution. The new revenue law does not say in specific terms that the cash surrender value of a life insurance policy is assessable. It is not assessable, therefore, unless made so by the general provision which requires the taxation of all property not exempted by the constitution or statute. The cash surrender value of a life insurance policy in force is not "property," within the meaning of that word as used in the revenue law. The "cash surrender" value, as that term is used in your inquiry, is the amount of money which the insurance company would return to the assured or the beneficiary if the policy were cancelled or annulled before the death of assured or before expiration of the term fixed by the contract. Whether any money would be so returned depends upon a contingency—the cancellation of the policy—and the amount returnable would depend in a measure on the amount of premiums paid by assured. If the contingency does not arise, assured does not get the money, and it will remain in the hands of the insurance company, where it is taxable. If the contingency does arise, the money is returned to the assured or to his beneficiary, where it may be assessed. The cash surrender provision is a modern invention, and serves many good purposes in life insurance. It requires a return of a portion of the premiums paid, where assured, by reason of poverty, affliction or other cause, cannot keep up his payments, and prevents the forfeiture of investments where he cannot keep his policy in force. This provision guards against some of the misfortunes resulting from the cancellation of a life insurance contract, and assured gets no money or derives no benefit from the cash surrender provision unless the misfortune actually arrives. It will be time enough to tax what results from the misfortune when the misfortune actually comes. From what has been said, it is perfectly clear that the Board must assume an insurance policy is annulled before it can assess as property the cash surrender value thereof. Public policy favors the enforcement of contracts, and the Board cannot assume that they are cancelled, for the purpose of discovering property which has no existence in fact, as long as the contracts are in force. For the purpose of taxing paid-up life insurance in the hands of the beneficiary, the Board would hardly feel like assuming that assured is dead or about to die. When the matter is considered, there does not seem to be any great necessity for taxing the cash surrender value of life insurance policies. The money in which the premiums are paid is assessable in the hands of

assured before payment, and after payment the money may be taxed in the hands of the insurance company. I am, therefore, of the opinion that the cash surrender value of life insurance policies is not assessable under the new revenue law of this State.

Very respectfully,

F. N. Prout,
Attorney-General.

OHIO

July 29, 1912.

Tax Commission of Ohio,
Columbus, Ohio.

Gentlemen:

I beg to acknowledge receipt of your letter of May 2d, requesting my opinion upon the following questions:

"Are life insurance policies taxable in this state?"

There are different kinds of life policies issued, some of which may be described as follows:

> "The ordinary life policy, which provides for the payment of an annual premium during life, the insurance being payable at death. Such policies may have some cash surrender value.
>
> Another form provides for the payment of fixed premiums during a limited period of years, the insurance being payable at death. After the policy is paid up it has a cash surrender value, the amount of which is sometimes fixed in the policy.
>
> Another form provides for the payment of fixed premiums during a definite term of years and payment of the insurance at death or at a certain fixed time prior thereto. These policies also have a cash surrender value."

I have searched in vain for authority upon this question, which would seem to be one which would be likely to arise frequently. It is unquestionably true that life insurance policies represent to the policyholder valuable interests—property rights convertible into money and protected by the law of the state, which, in good conscience, ought to be assessed upon the tax lists, and made to contribute to the public revenues. Furthermore, it was surely the intention of the framers and adopters of the Constitution of 1851 that such valuable interests, in common with other property, should contribute equally to the revenues of the state. Article XII, Section 2, of the Constitution provides that:

"Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money."

It is seemingly obvious that this provision is not self-executing. That is to say, unless laws are passed taxing investments and bonds, for example, such investments cannot be taxed although laws may have been passed taxing the other classes of things enumerated in the constitution. It is thus seen that it is possible for the General Assembly, in carrying out the mandate of the constitution makers, inadvertently to omit some class of property or property rights which the constitution requires to be taxed uniformly with other property. This possibility has been recognized in many adjudicated cases, which it is not necessary to cite and which hold that such inadvertence neither invalidates the legislation which has been enacted nor affords ground for taxing the things thus omitted.

It is also apparent from Article XII, Section 2, of the Constitution, that the things subject to the property tax, and hence, to the uniform rule, are enumerated and classified therein; that is to say, in order that a subject of ownership may be fixed by the property tax, it must be one of the things referred to in the section—moneys, credits, investments in bonds, investments in stocks, investments in joint stock companies, investments otherwise than in bonds, stocks, or joint stock companies, or personal or real property. But it does not follow that these words of Section 2 of Article XII have any extra legislative meaning, any more than it does that the whole section is self-executing. It devolves upon the legislature to formulate definitions of those terms, just as it does to pass laws whereby the taxing power of the state shall be made effective.

In the discharge of this necessary duty the legislature has enacted the following statutes:

Section 5323. The term "investment in bonds" * * * includes all moneys invested in bonds, certificates of indebtedness, or other evidences of indebtedness of whatever kind * * *.

Section 5324. The term "investment in stocks" * * * includes all moneys invested in the capital or stock of a bank * * * or an association, corporation, joint stock company, or other company, the capital stock of which is or may be divided into shares, which are transferable without the consent of the other * * * stockholders * * *.

Section 5325. The term "personal property" * * * includes first, every tangible thing being the subject of ownership, whether animate or inanimate, other than money, and not form-

ing part of a parcel of real property, as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion or interest in such stocks, profits, or means, by whatsoever name designated * * * third, money loaned on pledge or mortgage of real estate * * *.

Section 5326. The term "credits" as so used, means the excess of the sum of all legal claims and demands, whether for money or other valuable thing * * * due or to become due to the person liable to pay taxes thereon— * * * over and above the sum of legal bona fide debts owing by such person * * *.

Section 5328. All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom.

This section, however, is not of itself effectual to tax every subject of ownership. Its provision shows that it is declaratory merely of the intention of the legislature that certain property shall be taxable, as distinguished from such property, as is intended to be properly exempted from taxation.

Section 5375. A person required to list property, upon receiving a blank for that purpose from the assessor, or, within five days thereafter, shall make out and deliver, annually, to the assessor, a statement, verified by his oath, of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, *annuities or otherwise,* in his possession, or under his control, on the day preceding the second Monday of April of that year, which he is required to list for taxation, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor or otherwise.

Section 5376. Such statement shall truly and distinctly set forth, first, the number of horses, and the value thereof; second, the number of neat cattle, and the value thereof; third, number of mules and asses, and the value thereof; fourth, the number of sheep, and the value thereof; fifth, the number of hogs, and the value thereof; sixth, the number of pleasure carriages, of every kind, and the value thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eighth, the number of watches, and the value thereof; ninth, the number of pianos and organs, and the value thereof; tenth, the average value of the goods and merchandise which such person is required to list as a merchant; eleventh, the value of the property which such person is required to list as a banker, broker, or stock-jobber; twelfth, the average value

of the materials and manufactured articles which such person is required to list as a manufacturer; thirteenth, moneys on hand or by deposit, subject to order; fourteenth, the amount of credits as hereinabove defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities or otherwise; sixteenth, the monthly average amount of value for the time he held or controlled them, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities of the United States or of this State, not taxed to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April.

Section 5388. In listing personal property, it shall be valued at the usual selling price thereof, at the time of listing, and at the place where it may then be. If there is no usual selling price known to the person whose duty it is to fix a value thereon, then at such price as he believed could be obtained therefor, in money, at such time and place. Investments in bonds, stocks, joint stock companies, or otherwise, shall be valued at the true value thereof, in money. Money, whether in possession or on deposit, shall be entered in the statement at the full value thereof, except that depreciated circulating notes shall be entered at their current value. A credit for a sum certain, payable in money, property of any kind, labor or service, shall be valued at its true value in money, except that if it is for a specific article, or for a specified number or quantity of any article or articles of property, or for a certain amount of labor or services of any kind, it shall be valued at the current price of such property or of such labor or service, at the place where payable. Annuities or moneys receivable at stated periods, shall be valued at the sum which the person listing them believes them to be worth in money at the time of listing.

Manifestly, the right of a policyholder, under a paid-up life insurance policy or under certain types of policy when not paid up, if such policy has a cash surrender value, is not "money" as defined in Section 5326, above quoted; it is not "credits" as defined in Section 5327, *supra,* because it is not a legal claim or demand to which the policyholder is entitled without parting with nothing of value to himself; it is rather a right to elect between two inconsistent benefits of a policy; nor is it a claim which is "due or to become due" as provided in said section; it is not an "investment in bonds" as defined in Section 5323; nor an "investment in stocks" as defined in Section 5324; nor "personal property" as defined in Section 5325. All of the last three statements are manifestly true.

If then the policyholder's interest in a life insurance policy is comprehended within any one of the classes of taxable things enumer-

ated in Article XII, Section 2, of the Constitution, it must be an "investment otherwise," within the meaning of said section. The word "investment" in the sense in which it is used here, is defined as follows in the Century Dictionary:

> "* * * expenditure for profit or future benefit; the placing or conversion of capital in a way intended to secure income or profit from its employment * * *. (2) that which is invested; money or capital laid out for the purpose of producing profit or benefit. (3) that in which money is laid out or invested."

Cases in which the word "investment" has been used afford no definition other than the three quoted from the lexicon. It is apparent that in the financial sense there are three shades of meaning in which the word may be used: first, it may describe an act; second, it may refer to the money used; and third, it may refer to the thing purchased or held with a view to profit. In which sense, then, is the word used in the Constitution, or, rather, in what sense has the legislature defined the word as used in the Constitution?

This question is easily answered as to investments in bonds and stocks. *There the thing to be taxed is not the property or evidence of indebtedness* or security purchased for investment purposes, but the *money* so laid out and expended; at least this is clearly inferable from Sections 5323 and 5324 *supra*. There is, however, no definition of the phrase "investments otherwise" as used both in the Constitution and in the statutes. Does it refer to moneys, invested otherwise than in stocks or bonds, or to the thing in which the investment has been made? Certainly, it cannot refer to the act of investing, as an act is not a proper subject of taxation.

It seems to me that the answer to this question is furnished by Section 5376 *supra*. Item 15 therein is as follows: "the amount of all moneys invested in bonds, stocks, joint stock companies, annuities, or otherwise;" this provision is interesting for two reasons: in the first place it shows that investments "otherwise" are the same kind of investments as investments in stocks; that is, the thing taxed is the money invested, and not the thing in which it is invested. The meaning of "or otherwise," as the phrase is used in the Constitution, is pointed out in this legislation. I refer to "annuities," which the legislature evidently intended to provide specifically for, and not to leave covered by the generic term "otherwise."

When we come to Section 5388, certain difficulties are encountered; although the thing taxed is the amount of money invested, yet "investments" are to be valued at the true value thereof in money, while "annuities" or moneys receivable at stated periods "shall be

valued at the sum which the person listing them believes them to be worth in money at the time of listing." These rules for valuations are more appropriate to the idea of investments considered from the standpoint of the thing in which the investment is made. The paradox, however, afforded by comparison of Section 5376 and Section 5388 is not concerned in the question under consideration; suffice to say, as to Section 5388, that a method of valuing "investments otherwise" than in "stocks, bonds, joint stock companies and annuities" is therein provided for. Seemingly, it was the intention of the General Assembly that all investments should be taxed.

Is, then, the life insurance policy an "investment"? The germ of the idea of investment is that of profit. If one makes an investment he does so with the expectation of preserving the principal sum so expended, and reaping thereby, in addition thereto, a reasonable profit.

Now, the holder of a policy of a life insurance company makes an investment, to the benefit of which he himself is never entitled unless it be in the case of an endowment policy. The real investment is for the benefit of his beneficiary. His right to demand the cash surrender value of his policy is dependent upon his waiver of the benefits to accrue to his beneficiary. He cannot reserve the one and secure the other. If he surrenders the policy and secures the surrender value thereof, he will not receive anything like the amount of money which he has expended in premiums, to say nothing of the interest thereon. True, the cash value of a policy is a thing upon which money can be secured as a loan; this fact, however, tends rather to establish the conclusion that the policyholder's right to the cash surrender value is rather a "credit" or "property" than an "investment," and certainly does not go to show that it is to be regarded as the latter.

Certainly, then, so far as the cash surrender value of a policy is concerned, it cannot be said to be an "investment." No person ever buys a life insurance policy with the purpose, at the time, of surrendering it for its cash value at some future date; if he did he would be making a mistake and not an investment, knowing, as he does, that he will expend a much larger amount than he will receive by virtue of the transaction.

I am, therefore, of the opinion that the fact that a life insurance policy has a cash surrender value does not render the same, to the extent of the policyholder's interest therein, an "investment." In this connection the following remarks, which are *obiter dicta* found

in the opinion of Burket, C.J. in *Chisholm v. Shields,* 67 O. S. 374-377, 378:

> "It is claimed by counsel for defendant in error, that this legacy (which gave to testator's widow an annuity chargeable against the body of his estate) is an investment in an annuity, and being of the same general class as credits, investments in bonds and stocks, that it is included within the word *'otherwise'* that all property must be taxed, and that as this legacy is property, it must also be taxed. But this section is only the declaratory section, and subsequent sections, especially 2736, 2737, and 2739 carry this declaratory section into execution, and prescribe the manner in which taxation is to be imposed upon property therein specified; and property not so specified in any section is not taxed; as for instance, investments in life insurance policies are not taxed, for the reason that no statute authorizes their taxation, although thousands if not millions of dollars are invested in them, many being fully paid up, and others having a surrender value. Such policies are clearly property, and very valuable property at that, but not taxed, because no statute specifically requires their taxation. The same is true of any other valuable investments. So that the word 'otherwise' in Section 2731 includes only such property or investments as are specifically mentioned and required to be taxed in the subsequent sections, and property or investments not so mentioned cannot be taxed. And in so specifically mentioning and requiring to be taxed, the property must be such as is ordinarily included in the description given, and not such as can be brought within the description by a process of reasoning only, or by a strained construction. The general assembly must be presumed to be able to fairly describe such property as it desires to tax, without resorting to a strained construction, or a course of fine reasoning."

If the Supreme Court had had before it, for decision in this case, the points concerning which these remarks are made, they would, of course, be conclusive of the question which you ask. Even as it is they are entitled to great weight. In the face of the reasons above stated, and the conclusion at which I have independently arrived, together with this decision, I am compelled to take the view that the policyholder's interest in an ordinary life insurance policy, or in a limited term policy, which said interest consists merely of a right to a cash payment upon the surrender thereof, is not taxable at all, whether the policy is paid up or not.

The above remarks, however, do not necessarily apply to an endowment policy. I am not familiar with the forms of contracts in use, by life insurance companies, but if I have a correct understand-

ing of the matter, the form of policy known as the endowment policy affords to the policyholder himself, after the expiration of a certain number of years from the date of the policy a fixed lump sum of money, or the annual payment of such a fixed sum of money. In order, however, to be entitled to these benefits, the policyholder must have, previously to the time fixed in the policy for payments thereunder, paid all the premiums due from him; that is to say, such policies must be paid up before the policyholder himself is entitled to receive any fixed sum of money, without waiving some alternative right. I am of the opinion that during the time in which premiums are being paid on a policy of this type it does not, for the reasons already stated, constitute an "investment"; that is to say, it is not taxable, at least, until it is paid up.

After such an endowment policy becomes paid up, however, the situation is entirely different. Under the terms of the policy, the policyholder is entitled to receive either a certain lump sum or a specified sum, annually, for a limited number of years. This right of the policyholder is his without surrendering any alternative right. If it is stipulated in the policy that some time shall elapse between the payment of the last premium and the payment of the lump sum or annuity, during which time the benefits due under the policy will, in the event of the death of the assured, be paid to the beneficiaries, then, during such time, the right of the assured to the payments provided for in the policy is not yet fully vested; that is to say, as against the contingent rights of the beneficiary he cannot dispose of the payments by assignment or will; nor, in the event of his death intestate, would his personal representatives be entitled thereto. I am, therefore, of the opinion that prior at least to the time when the right to the payments under an endowment policy becomes absolutely vested in the assured, his interest in the policy is not taxable, though the same be fully paid up.

If, however, the time has arrived when, under the policy, the assured is entitled to have either a lump sum paid to him or a fixed sum paid annually to him, and he has made the necessary election, but has not received payments thereunder, his interest, if the sum due be a lump sum, is clearly a "credit," as the sum is defined by our statute. *Cooper v. Board of Review,* 207 Ill. 472.

If the policyholder has elected to receive his benefits in yearly payments, and one of these payments is due and unpaid, such installments would of course be listed as a "credit," whether or not his interest in the policy, reduced by such amount, would then be taxable as an "annuity," within the meaning of our statutes, or as a

"credit," is, in view of the language used by Burket, J., in *Chisholm v. Shields, supra,* a very doubtful question. I should be inclined to hold that such interest is not taxable.

Yours very truly

TIMOTHY S. HOGAN,
Attorney-General.

MINNESOTA

June 4, 1913.

Minnesota Tax Commission,
The Capitol.

GENTLEMEN:

You have asked this department the following question:

> "Is the cash surrender value of a life insurance policy taxable as a credit against the person entitled to receive such surrender value,—such person being a citizen of this State?"

You are advised as follows:

Section 798, R. L. 1905, defines a credit, for purposes of taxation, as being—

> "Every claim and demand for money, or other valuable thing, and every annuity or sum of money receivable at stated periods, due or to become due; and all claims and demands secured by deed or mortgage, due or to become due."

The exact character of the cash surrender value of an existing life insurance policy is dependent largely upon the particular language of the policy, and prior to 1907 there were no standard provisions which the law required all such policies to contain. In many policies, this surrender value cannot be obtained without the consent of the beneficiary. A general definition that is probably applicable to most life insurance policies is that the cash surrender value is the amount of money which the insured may be entitled to have upon his surrendering or consenting to the cancellation of his policy of insurance. Such value is determined by the amount of the net reserve held by the company on such policy, but under our statutes (Section 4, Chapter 198, Laws of 1907, and Section 5, Chapter 220, Laws of 1907, as amended by Chapter 152, Laws of 1913) may be subject to a deduction of not more than 2½% of the amount insured by the policy.

After the insured has surrendered his policy and has demanded the cash surrender value thereof, under the terms and conditions required by the policy, he then undoubtedly becomes a creditor of the company, and the amount then due him is a credit which is taxable under the laws of this State. The relation then existing between him and the insurance company is that of creditor and debtor, and the amount due is a definite liquidated sum; but until the holder of the policy has so elected to surrender his insurance, the only relation then existing is that of insured and insurer. The insurance policy continues in effect and is a contract of indemnity to the beneficiary. While this contract of insurance remains in force, the cash surrender value is not a *right* to which the insured is entitled without the surrender of other valuable rights, and until the insured elects to abandon his insurance contract, either by defaulting in the payment of premiums, or otherwise, he has no "claim or demand due or to become due."

The cash surrender value is equivalent to salvage when the contract of insurance is abandoned. In order to obtain this salvage, the insured must part with his policy of insurance and consent to a cancellation of all of the rights of the beneficiary and surrender the status of being insured. It may well be said that it is the giving up of these rights which constitutes the consideration for the payment by the company of the cash surrender value. At any rate, these are valuable rights which must be given up before there is any surrender value in existence which could be taxed as a credit.

While the policy continues in force, the holder has a right to elect between two inconsistent benefits of the contract, namely, first, to continue his insurance contract, preserving the rights of himself and his beneficiary; second, to abandon all such rights, changing his status of an insured person to that of a creditor, and claim his salvage.

Your inquiry, therefore, is answered in the negative.

Yours very truly,

WILLIAM J. STEVENSON,
Assistant Attorney-General.

WJS-EG